

Superior Court of California
COUNTY OF VENTURA
Juvenile Division

**JUVENILE COMPETENCY TO STAND TRIAL
PROTOCOL AND MANUAL**

2016

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
COMPETENCY TO STAND TRIAL OVERVIEW	1
INFORMAL RESOLUTION OF A POTENTIAL JUVENILE COMPETENCY TO STAND TRIAL ISSUE	3
FORMAL COMPETENCY TO STAND TRIAL PROCEEDINGS	4
Declaring a Doubt	4
When the Court Does Not Find Substantial Evidence Exists	5
When the Court Finds Substantial Evidence Exists	5
SUSPENSION OF JUVENILE PROCEEDINGS / JUVENILE COMPETENCY FORENSIC EVALUATION	6
Possible Stipulation by the Petitioner	6
Procedure Upon Appointment of CST Expert	7
No Need for Welfare and Institution Code section 827 Petition	8
Location of CST Evaluation Interview	8
Separately Retained Experts	8
RETURN OF THE COMPETENCY EXPERT REPORT	9
COMPETENCY HEARING	10
Timing of Hearing	10
Trial Judge	10
Presumption of Competence; Burden of Proof	10
Presentation of Evidence	11
Minor Has No Right to Testify	11
Defense Counsel Can Disagree with Youth	11
Court Must Consider Expert's Opinion	12
Youth's Statements in Subsequent Proceedings	12
Express Finding after the Hearing	12
Situations Requiring Second Hearing	13
STEPS FOLLOWING POST-TRIAL FINDING	13
If the Youth is Found Competent	13
If the Youth is Found Incompetent	13
Other Motions	13
Remediation of Competency Program	14
Placement of Youth	14

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
Remediation of Competency is the Main Goal.....	14
State Examination of Developmentally Disabled Youths	15
Periodic Remediation of Competency Reviews	15
Opinion of Evaluator Regarding the Ability of Youth to Remediate to Competency	16
Determination of Continued Remediation of Competency Services	16
Jurisdiction.....	16
New Offenses.....	17
OUTCOME OF REMEDIATION OF COMPETENCY PLAN	17
Contested Remediation Hearings.....	17
Remediated to Competency	18
Statutory Time Limitations Begin Again.....	18
Credit for Pre-commitment Confinement	18
No Remediation to Competency in the Foreseeable Future	18
Refiling the Dismissed Charge	19
RESOURCES	20
STANDING ORDER PERTAINING TO COMPETENCY TO STAND TRIAL WELFARE AND INSTITUTIONS CODE SECTION 827	

JUVENILE COMPETENCY TO STAND TRIAL PROTOCOL AND MANUAL

INTRODUCTION

When a juvenile delinquency judge believes a minor (youth) may be incompetent to enter a plea, stand trial, or be sentenced because the youth does not understand the court process or cannot effectively communicate with his/her attorney, the Court must suspend the proceedings. To proceed otherwise would be unjust as it would subject the youth to a court process that the youth is not competent to understand. Welfare and Institutions Code section 709 is the controlling statute for the competency to stand trial (CST) process.

Welfare and Institutions Code section 709(a)¹ states:

During the pendency of any juvenile proceeding, the minor's counsel or the Court may express a doubt as to the minor's competency. A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as a factual understanding, of the nature of the charges or proceedings against him or her. If the Court finds substantial evidence raises a doubt as to the minor's competency, the proceedings shall be suspended.

This protocol and manual encompasses the procedures for juvenile competency proceedings and remediation of competency in the County of Ventura Juvenile Court (the Court).

CST procedures are a step by step process which this protocol seeks to present in a fashion which will facilitate their implementation.

COMPETENCY TO STAND TRIAL OVERVIEW

- I. A doubt is expressed: The Court determines if substantial evidence of doubt regarding potential incompetency exists.
 1. If substantial evidence does not exist:
 - a. Continue with underlying juvenile proceedings.
 2. If substantial evidence of doubt does exist:

¹ California Welfare and Institutions (Welf. & Inst.) Code section 709.

- a. The Court states doubt on the record.
- b. The Court suspends regular juvenile proceedings.
- c. The Court appoints a Juvenile Competency Forensic Expert.
- d. The Court sets future court dates.

II. Upon receipt of the Expert's report, parties may:

1. Stipulate to the opinion.
2. Submit the question to the Court based on the report.
3. Request a contested hearing.
 - a. Youth is presumed competent.
 - b. Burden of proof lies with the party, ordinarily the youth, seeking a finding of not competent to stand trial (NCST).
 - c. Standard: preponderance of evidence.

III. If youth is found competent, the Court shall:

1. Reinstate regular juvenile proceedings.

IV. If youth is found not competent, the Court shall:

1. Order youth to comply with a Remediation of Competency Program as overseen by the Ventura County Probation Agency (Probation).
2. Conduct a hearing within 10 judicial days regarding implementation, participation, and progress of remediation of competency case plan.
3. Set subsequent 30-day (in-custody), 45-day (out of custody) review hearings to determine if youth has been remediated to competency or if there is a substantial probability that the youth will be remediated to competency in the foreseeable future.
4. If at any review, the Court finds that the youth has not remediated to competency, in order for remediation efforts to continue, the Court must find that there is a substantial probability that the youth will be remediated to competency in the foreseeable future. If the Court cannot make such a finding it may either:
 - a. Dismiss the case pursuant to Welfare and Institutions Code section 782 (see **Process for Dismissal**) or
 - b. Continue the case but vacate participation in Remediation of Competency Program (RCP) until such time the Court no longer retains jurisdiction (see **Jurisdiction**)

INFORMAL RESOLUTION OF A POTENTIAL JUVENILE COMPETENCY TO STAND TRIAL ISSUE

Pursuing formal CST proceedings in some juvenile cases may not be in the best interests of justice, public safety, and the welfare of the youth as mandated by Welfare and Institutions section 202(d). In some circumstances, when it is suspected that a youth may not be competent to stand trial, deferring a resolution of the outstanding petition may be a useful alternative to initiating formal competency proceedings. This deferral procedure might allow the youth to benefit from services and interventions which would otherwise be interrupted or unavailable if formal competency proceedings were initiated. After a formal finding of incompetency the focus must be on remediating the youth to competency or determining the futility of such efforts. Services prior to that stage can be much broader. Once the Court declares a doubt and suspends juvenile proceedings, the issue of CST must be resolved before juvenile proceedings can be reinstated. The doubt cannot be withdrawn.²

There are several informal resolutions that could be tried. The District Attorney and the defense could agree to continue the case to determine if the youth can voluntarily participate in therapeutic based programs available in the community or privately retained. Services offered by programs such as Tri-Counties Regional Center, ICMC, special programming offered through the youth's school district, or other interventions which would achieve the rehabilitative goals of the juvenile justice system while protecting public safety should be considered.

If the youth is already a 602 ward, a continuance of the arraignment on the current petition or an outright dismissal pursuant to Welfare and Institutions Code section 782 could also be entertained by the District Attorney and the defense if public safety would not be endangered.

In making this determination, consideration should be given to whether the services being provided outside the juvenile justice system or already in place within the juvenile justice system would obviate the need for jurisdiction on the current petition, and whether pursuing formal competency proceedings, including potentially protracted proceedings, is in the best interests of justice, public safety, and the welfare of the youth.

Periodic reviews should be scheduled. If, at any of the reviews it appears that judicial intervention is no longer necessary for public safety, dismissal of the case should be considered. If it appears that the youth is in need of a higher level of intervention, in the interest of public safety, the parties should allow the case to proceed formally.

² *In re John Z.* (2014) 223 Cal.App.4th 1046.

Although the youth is entitled to be screened for informal probation, pursuant to Welfare and Institutions Code sections 654 and 654.2, these programs cannot be utilized for this informal resolution process if the youth is truly incompetent because those programs presume the consent of the youth, which cannot be given if the youth is not competent. However, a screening may give more insight and information to the parties and a decision as to how best to proceed can be made at the subsequent screening hearing based on the information contained within the screening report.

FORMAL COMPETENCY TO STAND TRIAL PROCEEDINGS

If the question of the youth's CST cannot be resolved informally, the next step would be for the Court to determine if substantial evidence exists which raises a doubt as to the youth's competency and if so, declare a doubt, if this has not already been done.

Declaring a Doubt

During the pendency of any juvenile proceedings, the youth's counsel, or the Court, may express a doubt as to a youth's CST. Before the Court can actually declare a doubt and suspend juvenile proceedings, it must find and state on the record that "substantial evidence exists which raises a doubt as to the youth's competency."³

If a doubt is expressed the Court must conduct a preliminary inquiry into the youth's CST. The Court can consider any reasonable evidence which might indicate the youth's CST. This can include statements from defense counsel, probation, or the youth's parents. Frequently, defense counsel submit a psychological evaluation which has been prepared specifically for this purpose. The question is whether that evidence constitutes "substantial evidence" of a youth's incompetence under Welfare and Institutions Code section 709. There is no simple formula applicable to all situations. Evidence is substantial if it raises a reasonable doubt concerning the youth's ability to understand the nature of the juvenile proceedings against him or her, or to assist in his or her defense.⁴ Substantial evidence is not just any evidence that supports the possible fact but requires evidence that is "reasonable in nature, credible, and of solid value."⁵ Penal Code sections 1367-1368 and their attendant cases can provide guidance for legal standards in juvenile section 709 proceedings as well as *The Santa Clara County Juvenile Competency Manual and Protocol 2011*.

³ Welf. & Inst. Code section 709(a).

⁴ *People v. Rogers* (2006) 39 Cal.4th 826, 847.

⁵ *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.

Pursuant to section 709(a), a youth is incompetent to stand trial if he or she:

“[L]acks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding; or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her.”⁶

Incompetency may be the result of a mental disorder, a developmental disability, developmental immaturity, or other condition.⁷ Also, because the standard relates to the child’s ability to participate meaningfully in the court proceedings, it calls for present competency; it is not enough that he or she may become competent in the future.⁸

When the Court Does Not Find Substantial Evidence Exists

If the Court does not find that substantial evidence exists which raises a doubt as to the youth’s competency, the underlying delinquency proceedings will not be suspended.

When the Court Finds Substantial Evidence Exists

When the Court finds that there is substantial evidence of doubt as to the competency of the youth, no matter how persuasive other evidence may be to the contrary, the Court must suspend regular juvenile proceedings and order formal Welfare and Institutions Code section 709 proceedings.

The Court must enunciate the doubt or lack of doubt as to the youth’s competency on the record. The Court should put on the record the basis for the Court’s finding.

Next, the youth needs to be advised of his/her rights concerning competency proceedings. This advisement may be done by the attorney or the Court. Although in some cases a youth may not have the capacity to understand his/her rights, an attempt should be made. Even if the youth does not have the capacity to understand his/her rights, the Court should continue with the competency proceedings.

The youth should be advised of the following rights on the record:

- The right to see and hear the witnesses
- The right to question the witnesses through the attorney
- The right to present their own witnesses and evidence

⁶ Welf. & Inst. Code section 709(a).

⁷ Welf. & Inst. Code section 709(b); see also *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860.

⁸ Welf. & Inst. Code section 709(a).

- The fact that the judge will make the witnesses come to Court if they will not come
- The right to testify and/or the right to remain silent

The advisement should include a description of the subsequent proceedings depending on the Court's finding, be it reinstating the juvenile case or referring the youth to the Remediation of Competency Program overseen by the Ventura County Probation Agency.

SUSPENSION OF JUVENILE PROCEEDINGS JUVENILE COMPETENCY FORENSIC EVALUATION

Upon suspension of the delinquency proceedings, the Court shall order an evidentiary hearing to determine the youth's competency. The Court shall appoint an expert to determine "whether the youth suffers from a mental disorder, disability, developmental immaturity, or other condition, and if so, whether the condition or conditions impairs the youth's competency."⁹

As provided by Welfare and Institutions Code section 709(b), the Court must select a professional from a list of experts having expertise in child and adolescent development, training in the forensic evaluation of juveniles, and who are familiar with the competency standards and accepted criteria used in evaluating the competence of juveniles. Currently (2016), the gold standard for evaluating the competence of juveniles is the JACI, the Juvenile Adjudicative Competence Interview, designed by Thomas Grisso. The attorneys should seek appointment of an expert familiar with the JACI if at all possible. The expert must also meet the criteria set forth in California Rules of Court, rule 5.645, subdivision (d).

The County of Ventura Superior Court shall maintain and keep current the list of qualified experts.

Possible Stipulation by the Petitioner

If defense counsel previously submitted a psychological evaluation by a qualified expert as evidence of the youth's incompetency when defense expressed a doubt, the Court may want to inquire of the petitioner if he/she is willing to stipulate to that opinion, or submit on the opinion and proceed directly to a competency hearing and commence remediation of competency services.

⁹ Welf. & Inst. Code section 709(b); see also California Rules of Court, rule 5.645(d).

The petitioner is not required to stipulate to this procedure and if they do not, a Competency Forensic Expert should be appointed as described above.

At the same time, if the Court has evidence that the youth is developmentally disabled, it shall appoint the director of a regional center to evaluate the youth to determine if the youth is eligible for services under the LPS Act.¹⁰ This evaluation shall not delay the court proceedings for the determination of competency.¹¹

Procedure Upon Appointment of CST Expert:

1. The Court shall initially schedule three hearing dates:
 - a. The day after the appointment for **CONFIRMATION THAT EXPERT HAS ACCEPTED**
 - b. 15 judicial days for **RECEIPT OF CST EVALUATION REPORT**
 - c. 17 judicial days for **COMPETENCY REVIEW PRETRIAL**. At this hearing the parties will determine if there will be a stipulation, submission, or a contested hearing of the CST issue
 - d. In the event of the expert's inability to accept the appointment, a new appointment shall be made. The time limits shall begin at the point of the new appointment

2. As soon as possible but no later than 24 hours after the appointment the judicial assistant shall contact the CST expert, either by phone, email, or fax, to confirm that the expert is available and can submit a CST evaluation by the ordered receipt date. The judicial assistant shall report to the Court the following day.

3. Within two (2) judicial days of the appointment of the expert, Probation shall submit the items listed in 3(a) to the judicial assistant to be included in the court ordered CST packet for transmission to the expert:
 - a. Probation shall be responsible for providing to the judicial assistant:
 1. The police report for the underlying offense and the petition
 2. Any behavioral health records, previous psychological evaluations, and current medication list which are contained in their file
 3. The most current existing social study of the youth

¹⁰ Welf. & Inst. Code section 4500 et seq.

¹¹ Welf. & Inst. Code section 709(f).

- b. Either party may submit directly to the expert any materials that they deem relevant such as educational records, other psychological evaluations and follow-up criminal reports pertaining to the current underlying charge. These items should be delivered directly to the expert by each party within three (3) judicial days of acceptance of the appointment
4. Within three (3) judicial days after confirmation of acceptance of the appointment, the judicial assistant shall prepare and deliver the CST packet to the expert. Along with the documents submitted by Probation, the packet will include:
 - a. The cover letter containing the Court's instructions for the expert, including where to and how to deliver the report, and where and how the youth can be contacted;
 - b. The court order indicating the name of the Judge and courtroom, appointment of the expert, the date the evaluation is to be returned, and that all documents submitted are confidential; and
 - c. The name, phone number, and email address for the defense counsel and deputy district attorney assigned to the youth's case.
5. Other than the judge, the party expressing the doubt should communicate with the expert regarding their concerns about the youth's CST.

No Need for Welfare and Institution Code section 827 Petition

Court Appointed Competency Experts shall be given access to confidential reports listed in this protocol without the need to file an 827 petition pursuant to standing order of the Superior Court of California, County of Ventura, Juvenile Division (attached).

Location of CST Evaluation Interview

If the youth is detained pending the evaluation, the evaluation shall take place at the Juvenile Facility.

If the youth is not detained, the expert shall schedule the appointment with the youth's parents or guardian and agree upon a location for the interview.

Separately Retained Experts

Defense counsel or the District Attorney may retain their own expert. Any reports obtained by the defense attorney shall be confidential unless the expert is expected to testify at the competency hearing, in which case counsel must provide copies of the

report and the expert's resume to opposing counsel. Any expert report pertaining to the youth's CST obtained by the District Attorney must be turned over to the defense. If the District Attorney has any possible *Brady* material, it must be provided to the defense as soon as it becomes known. All efforts shall be made by the attorneys to avoid delay in the competency proceedings.

The Court does not pay for any privately retained expert.

RETURN OF THE COMPETENCY EXPERT REPORT

On the day of the Competency Review Pretrial, three things may occur: (1) the parties may stipulate to the opinion of the expert; (2) the parties may submit on the opinion; or (3) the parties may contest the opinion, and set the matter for a contested competency hearing.

1. The parties may **stipulate** to the findings of the expert. A competency determination is still required. The Court should adopt the stipulation on the record and make the appropriate orders based on the stipulation (refer to the RCP or reinstate criminal proceedings). The doubt cannot be withdrawn nor the hearing waived, even if the parties agree to the outcome.¹²

The competency hearing could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The Court presumably could hold the competency hearing that day.

2. The parties may **submit** the matter to the Court for a court determination based on the expert's report(s). Basically, the parties would not be taking a position and leaving it up to the Court to decide. The Court must set a competency hearing and make its findings on the record. If the matter is only going to be submitted on the expert's report(s), the competency hearing could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The Court could hold the competency hearing that day.
3. The parties may **disagree** about the expert's opinion(s). In that case, the Court would set a contested competency hearing. The hearing could proceed by submission on some matters, stipulation on some matters, live testimony, and/or legal argument. The contested trial should be set within fifteen (15)

¹² *People v. Pennington* (1967) 66 Cal.2d 508, 521; *In Re John Z supra*; *In re R.V.* (2015) 61 Cal.4th 181.

calendar days of the Competency Review Pretrial, subject to an extension for good cause.

COMPETENCY HEARING

Welfare and Institutions Code section 709(b) states “Upon suspension of proceedings, the Court shall order that the question of the youth’s competence be determined at a hearing.”

Regardless of the conclusions or opinions of the Court-appointed competency expert, the Court that has initiated mental competency proceedings based upon “substantial evidence of doubt” must conduct a hearing on the youth’s competency, unless there is a stipulation to not have such a hearing, and the judge adopts the stipulation.¹³

Timing of Hearing

For a contested competency hearing, the Court must set the trial within fifteen (15) judicial days from the Competency Review Pretrial, unless there is good cause to extend the time for a short period to accommodate the availability of the expert witness(es) or to allow for completion of the new evaluations. If the expert(s) needs to be available for trial, scheduling would have to be coordinated.

De facto good cause would exist for a reasonable continuance if an attorney needs time to secure his/her own expert to render a second opinion. The Court must limit the amount of time for the continuance to avoid delay. If the attorney securing the second opinion does not work diligently, the Court may proceed to trial without counsel’s expert(s). Also, the Court should be prudent in continuing hearing dates any longer than absolutely necessary when the youth is in custody.

Trial Judge

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the youth’s competency to stand trial.¹⁴

Presumption of Competence; Burden of Proof

The youth is presumed competent at the start of the competency hearing. The burden of proof is on the party claiming incompetency to stand trial by a preponderance of the

¹³ *In re John Z.* (2014) 223 Cal.App.4th 1046; California Rules of Court, rule 4.130(e) (1).

¹⁴ *People v. Hill* (1967) 67 Cal.2d 105, 113; *People v. Lawley* (2002) 27 Cal.4th 102, 133-134.

evidence.¹⁵ A preponderance of evidence exists when the evidence shows that it is more likely than not, that the minor is incompetent.

When neither the prosecution nor the youth seeks a finding of incompetency, the trial judge may take the initiative and assume the burden of producing evidence of incompetency.¹⁶

Presentation of Evidence

Typical order of presentation:

1. The party with the burden of proof presents its evidence first; typically that would be the defense. The youth's attorney offers evidence of the youth's incompetency, if such evidence exists, and chooses to do so.
2. If defense counsel does not offer evidence of incompetency, the District Attorney may do so.¹⁷
3. If defense counsel puts on evidence of incompetency, the District Attorney next offers evidence of youth's present mental competence.
4. Each party may offer rebuttal testimony, unless the Court, for good reason and in the furtherance of justice, also permits other evidence in support of the original contention.¹⁸
5. The party not carrying the burden of proof offers its final argument, if any, followed by the final argument of the party claiming incompetency, if any.

Minor Has No Right to Testify

If the subject of a competency proceeding wants to testify, but his/her attorney does not want the person to testify, the subject of the proceeding has no right to testify. Sometimes defense counsel leaves it up to the youth to decide whether to testify or not, and defense counsel merely puts his/her statement on the record that "it is against advice of counsel for my client to testify, but I leave it up to my client; I am not objecting to his testimony." However, if defense counsel objects to the youth testifying, and asks the Court to not allow youth to testify, the Court should not allow the youth to testify.¹⁹

¹⁵ Welf. & Inst. Code section 709(c); *In re R.V.* (2015) 61 Cal.4th 181.

¹⁶ *People v. Skeirik* (1991) 229 Cal.App.3d 444, 459.

¹⁷ Penal Code section 1369(b)(2).

¹⁸ Penal Code section 1369(d).

¹⁹ *People v. Bell* (2010) 181 Cal. App.4th 1071.

Defense Counsel Can Disagree with Youth

Defense counsel may present evidence of the youth's incompetency even when the youth desires to be found competent.²⁰ In that event, (subject to *People v. Bell*), the Court may consider allowing the youth to testify as to his or her own present competency with the permission of defense counsel, unless the Court separately determines that the youth is incompetent to give testimony.²¹

Such conflict does not establish sufficient grounds to warrant substitution of counsel or the appointment of second counsel to oppose commitment.²²

Court Must Consider Expert's Opinion

The Court must consider the opinion(s) of the competency experts, but the Court does not have to agree with the opinion(s). On the other hand, the Court cannot reject opinions without reason.²³

Youth's Statements in Subsequent Proceedings

Neither statements made by a youth to any expert, nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to the youth's guilt.²⁴ Statements made during competency examinations or hearings may not be used to impeach the youth if he or she testifies at a later hearing.²⁵

This rule of immunity in competency proceedings extends to statements to employees of health facilities charged with restoring the youth's competency under Penal Code section 1370.²⁶

²⁰ *People v. Stanley* (1995) 10 Cal.4th 764, 804; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379 (adult cases) (in a competency matter defense counsel must advocate what he or she perceives to be in the client's best interests even when that interest conflicts with the client's expressed position). Note: in 2016, Welf. & Inst. Code § 634.3(a)(2) was added mandating that appointed counsel in a juvenile delinquency matter provide legal representation based on the client's expressed interests.

²¹ *People v. Harris* (1993) 14 Cal.App.4th 984, 993 [adult case].

²² *Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 33; *People v. Jernigan* (2003) 110 Cal.App.4th 131, 135-137 [adult cases].

²³ *In re R.V.* (2015) 61 Cal.4th 181, 216.

²⁴ California Rules of Court, rule 4.130(d) (3); *People v. Jablonski* (2006) 37 Cal.4th 774, 802-804; *People v. Arcega* (1982) 32 Cal.3d 504, 520.

²⁵ *People v. Pokovich* (2006) 39 Cal.4th 1240, 1246-1253.

²⁶ *In re Hernandez* (2006) 143 Cal.App.4th 459, 475-476.

Express Finding after the Hearing

The Court must expressly state on the record, either orally or in writing, its determination whether or not the youth is competent to stand trial, as well as the evidence considered and the reasoning in support of its finding.²⁷

Situations Requiring Second Hearing

When a competency hearing has already been held and the youth has been found CST, the Court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the competency finding.²⁸ The Court may take its personal observations of the youth into account in the determining whether there has been a significant change in the youth's level of competency.²⁹

STEPS FOLLOWING POST-TRIAL FINDING

If the Youth is Found Competent

Following a competency trial, when a judge finds a youth to be competent, the Court should place its finding on the record and reinstate regular juvenile proceedings. Welfare and Institutions Code section 709(d) states: "If the youth is found to be competent, the Court may proceed [with the underlying juvenile case] commensurate with the Court's jurisdiction." Juvenile proceedings should then be reinstated.

If the Youth is Found Incompetent

If the Court finds the youth incompetent, the Court should state its findings on the record and regular juvenile proceedings will remain suspended for a period no longer than reasonably necessary to determine whether there is a substantial probability the youth will remediate to competency in the foreseeable future. Although proceedings will remain suspended, the attorneys, judge, and probation will continue with the case to determine whether the youth can be remediated to competency.

Other Motions

Welfare and Institutions Code section 709(c) permits the Court to make certain orders after a finding of incompetency with respect to any matter that is capable of a fair determination without the participation of the youth, including but not limited to:

²⁷ California Rules of Court, rule 4.130(e)(4)(B); *People v. Marks* (1988) 45 Cal.3d 1335, 1343 [adult case].

²⁸ *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 383-387.

²⁹ *People v. Jones* (1991) 53 Cal.3d 1115, 1153.

1. A demurrer to the allegations in the petition.
2. A motion to suppress evidence under Welfare and Institutions Code section 700.1.
3. A rehearing on the issue of whether there is a prima facie case that the youth committed a public offense (initially determined at the detention hearing), pursuant to Welfare and Institutions Code section 637.
4. A motion to dismiss the petition under Welfare and Institutions Code section 782 on the grounds that the interests of justice and the welfare of the youth require it, or the youth is not in need of treatment and rehabilitation.

Remediation of Competency Program

Once the court has found the youth incompetent, the Court shall refer the youth to the Remediation of Competency Program (RCP) overseen by Probation. The Court shall set a hearing date within 10 judicial days of the finding of incompetency regarding the implementation of, and participation by the youth with his/her competency remediation case plan. The Remediation of Competency Program provider shall prepare a report describing youth's remediation case plan and the progress made in implementation to this date.

The next remediation of competency review should be set for 30 calendar days from the initial hearing if the youth is in custody, and 45 calendar days if the youth is out of custody.

Placement of Youth

If the youth is ordered into the RCP, the Court must order the youth placed in the least restrictive environment, taking into consideration these factors:

1. Where will the youth have the best chance of obtaining competence;
2. What are the needs of the youth; and
3. How serious is the underlying offense and is there an imminent need to protect society.

Remediation of Competency is the Main Goal

Standard probation and mental health services shall not interfere with the primary short-term goal of attempting to remediate a youth's competence. For instance, although an Individualized Education Plan (IEP) is important in normal situations, it is not the paramount goal during the period that remediation of competency is being attempted. Standard services which are not essential to the youth's competency shall be postponed until after the competency process has been completed. If however, some services will

help the youth remediate to competency, including educational services, those services should be maintained.

The Juvenile Court has an obligation to ensure that youths in the Court's care do not deteriorate mentally, physically, or emotionally. Toward that end, services that maintain the youth's health must be provided.

State Examination of Developmentally Disabled Youths

If the Court suspects the youth is developmentally disabled, there is an existing statutory process that leads to a State mental and physical examination of the youth and ensures the youth receives proper services.

“Developmental disability” is defined in Welfare and Institutions Code section 4512(a) and Title 7 of the California Code of Regulations, section 54000(a), as a disability that is attributable to mental retardation (an IQ of approximately 70 or below under DSM IV criteria), cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

A person with a developmental disability is eligible for initial intake at a regional center, diagnostic and counseling services, and a determination regarding the need for assessment. (7 CCR section 54010(a).) A person with a developmental disability that is also a “substantial disability” is also eligible for ongoing regional center services. (7 CCR section 54010(b).) “Substantial disability” means a condition resulting in a major impairment of cognitive or social functioning sufficient to require planning and services, combined with significant functional limitations in three or more of the following areas: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (7 CCR section 54001(a).)

In order for a person to qualify for these services, the State Regional Center within the geographic location of the Court must examine and accept the client. Because regular proceedings have been suspended, there is a question whether the Court can order a Regional Center examination. Typically, there will be no objection from the attorneys because such an examination can only help the youth. If the youth qualifies for Regional Center services and the youth chooses to participate, the services are provided throughout the lifetime of the client. A referral to the Regional Center for examination and possible placement should run parallel to the Court's competency process as any delay could result in the Court losing jurisdiction to make the referral. Any referral and examination should not interfere with the Court's remediation to competency process which is the primary goal.

Periodic Remediation of Competency Reviews

Periodic reviews of the youth's progress must be set. As soon as the youth is engaged in the RCP, all parties must proceed expeditiously with the youth's remediation of competency case plan.

If the youth has not been remediated to competency by the first scheduled 30/45-day competency review hearing, subsequent reviews should be set at 60-day intervals.

Opinion of Evaluator Regarding the Ability of Youth to Remediate to Competency

At each competency review hearing, the Remediation of Competency provider should render an opinion regarding whether the youth is competent or is likely to remediate to competency in the foreseeable future and any recommendations regarding further psychological or educational testing. This opinion should be rendered in writing.

However, if the recommendation is that remediation services should terminate, either because the youth has been remediated to competency or because the youth will not remediate to competency in the foreseeable future, the opinion and its basis must be rendered in writing.

Determination of Continued Remediation of Competency Services

At each competency review, the Court must decide if a further attempt at remediation to competency is warranted. Remediation of Competency services will continue only for so long as the Court finds that there is a substantial probability the youth will remediate to competency in the foreseeable future or the Court no longer retains jurisdiction per section 709(c). (See discussion regarding **Jurisdiction**, below.)

Jurisdiction

For the purposes of Welfare and Institutions Code section 709(c) only, the Ventura County District Attorney's Office and the Ventura County Public Defender's Office agree that:

- The Court retains jurisdiction no longer than a maximum time of one year for misdemeanors, or three years for felonies, calculated from the date the youth was ordered into the RCP.

During the pendency of RCP proceedings, the statute of limitations is tolled by operation of law pursuant to Penal Code section 803(b).

In the event of a dismissal based on the provisions of Welfare and Institutions Code section 709, either because the Court cannot find the youth will remediate to competency within the foreseeable future or the Court no longer retains jurisdiction due to the expiration of the time limits specified above, the applicable statute of limitations for the underlying charge will commence running again the day subsequent to the dismissal and shall be calculated in accordance with Part 2, Title 3, Chapter 2, section 799 et seq., of the California Penal Code.

New Offenses

The youth is presumed competent. When the youth is alleged to have committed a new offense or violation of probation, the probation officer should not postpone filing a new notice or petition merely because there is a pending competency process. Probation should proceed as if there were no competency process underway and Probation should not wait until the next scheduled court hearing to refer new cases to the District Attorney and/or file a Notice of Charges. Probation may also immediately admit the youth into custody which would trigger a detention hearing. Probation may also allow the youth to remain out-of-custody but set an immediate hearing. The handling of new alleged offenses is within the discretion of the Probation Agency.

The youth's attorney would then petition the Court for a review of the youth's current competency. Starting anew by applying this Protocol to the new petition/notice, the Court must make appropriate findings. If there is substantial evidence the youth may be incompetent, the Court will order the new petition suspended and the youth's treatment for the new alleged offense to be added to the pending attempt to remediate to competency.

If the Court determines there is not substantial evidence the youth is incompetent, the new case will not be suspended and the Court will proceed with the new underlying juvenile proceedings. The issue of the youth's competency on the previously suspended petition/notice will remain as is, until the Court makes a finding regarding competency on the matter.

Of course, a determination by the Court on the new case can significantly affect the competency issue on the formerly suspended case because the standard for competency is the "present" status of the youth. If the youth is competent on the new case, it is a factor to be considered on the pending competency issue.

OUTCOME OF REMEDIATION OF COMPETENCY PLAN

Contested Remediation Hearings

After an evaluation recommending resumption of regular juvenile proceedings or dismissal of the case, either the youth or the District Attorney may request a contested remediation hearing.

Remediated to Competency

If the Court finds that the youth has been remediated to competency, juvenile proceedings must be promptly resumed at the stage at which they were suspended.³⁰ Before reinstatement, the youth is entitled to 10 days' notice to determine whether to challenge the finding. The hearing, if requested, must be held within 15 judicial days from the request absent a stipulation to a different date. The burden is on the youth to show, by a preponderance of evidence, that the youth has not been remediated to competency. The Court cannot reinstate regular juvenile proceedings until after the hearing.

Statutory Time Limitations Begin Again

When a youth has been remediated to competence and juvenile proceedings are reinstated, the time limit for a speedy trial and/or speedy disposition begin afresh, beginning on the day regular juvenile proceedings are reinstated. The days that accrued before the youth's regular juvenile proceedings were suspended are not subtracted from the applicable time limits.³¹

Credit for Pre-commitment Confinement

At the disposition hearing in the underlying delinquency case, the youth will be afforded pre-commitment credits toward any maximum time for confinement. Credits should be granted only for days the youth spent in the Ventura County juvenile facility, in Ventura County jail, a locked medical or mental facility, or the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities. Days the youth spent in any other alternative placement(s) for remediation of competency services are not eligible for credits.

However, even if the Court gives credits to the youth, or the youth has served a period of confinement equal to the maximum time of commitment, the youth may be subject to

³⁰ Adult provisions at Penal Code section 1370(a)(1)(A) and Penal Code section 1370.01(a)(1).

³¹ Penal Code 1382(a)(2)-(3); California Rules of Court, rules 4.130(c)(2) and 4.130(c)(3)(b). [adult provisions]

extended civil commitment proceedings under the LPS Act if he/she is considered dangerous to self or others, or for the other reasons encompassed in the Act.³²

No Remediation to Competency in the Foreseeable Future

If the Court cannot find that there is a substantial probability that the youth will remediate to competency in the foreseeable future, the Court may dismiss the case. Before dismissal, the District Attorney is entitled to 10 days' notice to determine whether to challenge the dismissal. The hearing, if requested, must be held within 15 judicial days from the request unless there is a stipulation to a different date. The burden is on the District Attorney to show, by a preponderance of evidence, that there is a substantial probability that the youth will remediate to competency in the foreseeable future. The Court cannot dismiss the case until after the hearing.

If, after the hearing, the Court still cannot find that there is a substantial probability that the youth will remediate to competency in the foreseeable future, participation in the RCP should end and the underlying delinquency charge(s) should be dismissed.

In lieu of a dismissal, the District Attorney may petition the Court to continue to retain jurisdiction until the expiration of the jurisdiction limitation (see **Jurisdiction**). The Court should terminate the youth's participation in the RCP but schedule periodic reviews of the case.

The decision to make such a motion would most likely present itself when the youth's lack of remediation to competency is based on developmental immaturity and/or concerns for public safety due to the seriousness of the alleged conduct.

Refiling the Dismissed Charge

Any charge dismissed by the Court based upon a failure to remediate to competency within the jurisdiction limitation (see **Jurisdiction**) may be refiled within the statute of limitations as defined in Penal Code section 799 et seq. if it appears to the District Attorney that the youth is now competent. Although the youth will be presumed competent at the time of the refiling of charges, all of the previous reports and records of the competency proceedings pursuant to this protocol would be available for potential admission in any subsequent competency proceeding.

³² / *In re Banks* (1979) 88 Cal.App.3d 864, 871. [adult case]

RESOURCES

Alameda County Superior Court
Juvenile Competency Protocol 2013

Santa Clara County Superior Court
Juvenile Competency Manual and Protocol 2011

Youth Law Center
Protocol for Competence in California Juvenile Justice Proceedings 2012

California Judicial Council Invitation to Comment 2015
Leg 15-04: Proposed Legislation to amend Welfare and Institution Code section 709
Proposed effective date January 1, 2017

(Editor's note: if some or all of the above proposals are enacted into law in 2017, the *County of Ventura Juvenile Competency to Stand Trial Protocol and Manual 2016* may need to be reviewed and modified accordingly.)

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA
JUVENILE DIVISION**

**STANDING ORDER PERTAINING TO
COMPETENCY TO STAND TRIAL
WELFARE AND INSTITUTIONS CODE SECTION 827**

Welfare and Institutions Code section 827(P) shall include the
Court Appointed Competency to Stand Trial Expert in
Welfare and Institutions Code section 709 proceedings

Honorable Kevin McGee
Presiding Judge, Juvenile Justice Division
2016